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IN THE
COURT OF APPEALS OF INDIANA

MITCHELL LYSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0609-CR-516
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Priscilla Fossum, Judge Pro Tempore
Cause No. 49G04-0508-FB-146792

October 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mitchell Lyster appeals the sentence imposed following his conviction for child molesting, as a class B felony.[1]

We reverse and remand with instructions.

ISSUE

Whether the trial court improperly sentenced Lyster.

FACTS

J.J. was born on March 22, 1984. When she was eleven years-old, J.J. resided in Indianapolis with her mother, Jane Jones ("Mother"), and Mother's boyfriend, Lyster. In late December of 1994 and early January of 1995, Mother served three weekends in jail for driving while intoxicated. During one of those weekends, Lyster woke up J.J. while she was in bed. Lyster took off J.J.'s pajamas and "put his mouth on [her] private" and touched J.J.'s chest. (Tr. 87). Lyster also "tried having sex with [J.J.] by putting his penis in [her] vagina." (Tr. 88).

When J.J. started screaming, Lyster smacked her face, called her a bitch and told her to "shut-up . . . ." (Tr. 89). Lyster told J.J. "not to tell anybody or he'd hurt [J.J.] and [her] mom." (Tr. 90). Afterwards, Lyster made J.J. "go downstairs and l[ie] with him on the couch." (Tr. 90).

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[1] Ind. Code § 35-42-4-3.

Initially, J.J. did not tell anyone about the incident. In 2005, however, J.J. told her fiancé and Mother what had happened. At their urging, J.J. reported the incident to the police in May of 2005.

On August 30, 2005, the State filed charges against Lyster. On July 10, 2006, the State filed an amended information, charging Lyster with two counts of child molesting, as class B felonies. As to Count 1, the State alleged that Lyster "insert[ed] his finger into the sex organ of [J.J.] . . . ." (App. 17). As to Count 2, the State alleged that Lyster "did perform or submit to deviate sexual conduct, an act involving the sex organ of [J.J.] and the mouth of . . . Lyster . . . ." (App. 17).

The trial court held a jury trial on July 10, 2006. At the conclusion of the State's case-in-chief, Lyster moved for a directed verdict upon Count 1, which the trial court granted. The jury found Lyster guilty of the remaining count.

The trial court ordered a pre-sentence investigating report ("PSI") and held a sentencing hearing on August 18, 2006. The PSI indicated that Lyster had been adjudicated a juvenile delinquent three times: once in 1971 for committing an act that would constitute burglary if committed by an adult, and twice in 1970 for committing an act that would constitute theft if committed by an adult and for truancy.

As an adult, Lyster had been convicted of burglary in 1974 and operating a vehicle while intoxicated in 1984. The PSI also showed that in 1992, Lyster was charged with child molesting, as a class B felony. Lyster, however, was found not guilty. Also according to the PSI, Lyster again was arrested for child molesting in 1993 and charged

with two counts of child molesting, as class D felonies. Those charges, however, were dismissed in 1994.

Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Lyster to fifteen years, with five years suspended. Additional facts will be provided as necessary.

DECISION

Lyster argues the trial court erred when it sentenced him to an enhanced sentence of fifteen years.[2] Specifically, Lyster argues that the aggravating circumstances found by the trial court violated *Blakely v. Washington*, 542 U.S. 296 (2004).

In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating circumstances used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. 542 U.S. at 301. Furthermore, "the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's [presumptive] sentencing laws." *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 546 U.S. 976 (2005). An exception to this rule is the fact of a prior conviction. *Blakely*, 542 U.S. at 301.

During sentencing, the trial court stated, in pertinent part, as follows:

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[2] Subsequent to the date of Lyster's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-5, which set forth the sentencing range for a class B felony, to provide for an "advisory" rather than "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005). Thus, we shall analyze the propriety of Lyster's sentence under the presumptive regime.

At the time of Lyster's offense, the statutory sentencing range for a class B felony was six to twenty years, with the presumptive sentence being a fixed term of ten years with not more than ten years added for aggravating circumstances. I.C. § 35-50-2-5.

> Having reviewed the Defendant's criminal history, [the court] does find that there is a prior conviction, but in 1974, however . . . the Court's very concerned about the fact that there are at least two arrests for child molest in 1992 and 1993. The Court would, therefore, find that there are aggravating circumstances in this matter, would sentence the Defendant to a period of 15 years. . . . I would also show for the record that the Court did consider his employment history as a mitigating factor and the fact that the felony conviction was back in '74, but does find that the balance of that does overrule the mitigating circumstances.

(Tr. 206-07).

The trial court considered Lyster's prior arrests, which did not result in convictions, as aggravating circumstances. In light of *Blakely*, however, the arrests could not "be used as aggravators without a specific finding by a jury." *See Blakely*, 542 U.S. at 301; *Abney v. State*, 822 N.E.2d 260, 268 (Ind. Ct. App. 2005) (discussing dismissed offenses), *trans. denied*. In this case, the jury made no finding regarding Lyster's arrests. Accordingly, we find that the trial court considered only one proper aggravating circumstance, namely Lyster's burglary conviction in 1974.[3]

Where we find an irregularity in the trial court's sentencing decision, we may (1) remand to the trial court for a clarification or new sentencing determination, (2) affirm the sentence if the error is harmless, or (3) reweigh the proper aggravating and mitigating

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[3] We note that

> [a] record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history. However, a record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (citations omitted); *see also Abney*, 822 N.E.2d at 268 ("[W]here an enhanced sentence is based upon a defendant's prior history and aggravators derived of that history, the *Blakely* analysis is not implicated). Here, the trial court did not consider Lyster's arrest record as an indication that he will likely reoffend.

circumstances independently at the appellate level. *Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004). We elect appellate reweighing here.

As to criminal history, the significance of it "'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005) (quoting *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999)). Thus, the weight of a defendant's criminal history shall be "measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Id.*

Given that Lyster's criminal history consists of three juvenile adjudications in the 1970s, a conviction for burglary in 1974, and a misdemeanor conviction for driving while intoxicated in 1984, we find it to be marginally significant and of no greater weight than the mitigating circumstances—Lyster's employment history[4] and the proximity in time from his last felony conviction to the current one—found by the trial court. We therefore remand with instructions to vacate Lyster's fifteen-year sentence and to resentence him to the presumptive sentence of ten years.

Reversed and remanded with instructions.

KIRSCH, J., and MATHIAS, J., concur.

[4] According to Lyster's PSI, he was self-employed as a tile setter and contractor from 1976 through 2005.